

FILED 20 OCT '16 14:34 USDC ORP

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEROY LAMONT WELLS,

Plaintiff,

v.

Case No. 2:16-cv-00758-JE

FINDINGS AND RECOMMENDATION

MARK NOOTH, et al.,

Defendants.

JELDERKS, Magistrate Judge.

Plaintiff filed this prisoner civil rights case on May 2, 2016 and sought leave to proceed *in forma pauperis*. On June 21, 2016, I denied plaintiff leave to proceed *in forma pauperis* because he had at least five prior cases which had been dismissed as either frivolous or for failure to state a claim, and the court had routinely denied him leave to proceed *in forma pauperis* in his many filings as a result. See 28 U.S.C. § 1915 (prisoners not entitled to *in forma pauperis* status where they

have had three or more cases dismissed as frivolous or for failure to state a claim). Consequently, I advised plaintiff that if he wished to continue with his case, he must pay the \$400.00 filing fee by July 21, 2016.

Plaintiff did not pay the filing fee, and instead filed a Notice of Appeal (#25) on July 11, 2016 along with a Motion for Leave to Appeal *In Forma Pauperis* (#26). Upon further reflection, I realized that I should have recommended the denial of *in forma pauperis* status for review by a District Judge. However, because plaintiff had filed a Notice of Appeal, I did not think this court had jurisdiction to correct my error. I have just been notified by email that the Ninth Circuit Court of Appeals has remanded the case to the District Court with instructions to vacate my order denying *in forma pauperis* status and conduct further proceedings. I therefore recommend the court set aside my June 21, 2016 Order (#20) and independently determine whether petitioner is entitled to *in forma pauperis* status based upon his history of frivolous and meritless litigation, and further recommend that the court deny as moot plaintiff's pending Motion for Leave to Appeal *In Forma Pauperis* on Appeal (#26).

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RECOMMENDATION

The court should set aside my June 21, 2016 Order (#20), independently determine that petitioner is not entitled to *in forma pauperis* status, and deny as moot plaintiff's pending Motion for Leave to Appeal *In Forma Pauperis* on Appeal (#26). The court should also require plaintiff to pay the \$400.00 filing fee should he wish to continue with this case.

SCHEDULING ORDER

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 17 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.

DATED this 20 day of October, 2016.


John Velderks
United States Magistrate Judge